

ORDER NO. 4751

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Chairman;
Tony Hammond, Vice Chairman;
Mark Acton; and
Nanci E. Langley

Rule on Motions Concerning
Mail Preparation Changes

Docket No. RM2016-6

NOTICE OF PROPOSED RULEMAKING

(Issued August 9, 2018)

I. INTRODUCTION

The Commission initiates this notice of proposed rulemaking (NPR) to partially rescind the rule concerning procedures for mail preparation changes in response to the recent decision in *United States Postal Serv. v. Postal Reg. Comm'n*, 886 F.3d 1253 (D.C. Cir. 2018).

II. BACKGROUND

In Docket No. R2013-10R, the Commission determined that a change to the Intelligent Mail Barcoding (IMb) requirements constituted a change in rates requiring compliance with the price cap under 39 U.S.C. 3622.¹ The Postal Service appealed the Commission's determination to the United States Court of Appeals for the District of

¹ Docket No. R2013-10, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 21, 2013, at 5-35 (Order No. 1890).

Columbia (the Court). In *United States Postal Serv. v. Postal Reg. Comm'n*, 785 F.3d 740, 751 (D.C. Cir. 2015), the Court found that “changes in rates” under 39 U.S.C. 3622 could include changes to mail preparation requirements and were not limited to “only changes to the official posted prices of each product.” *Id.* However, the Court remanded the matter to the Commission so that it could articulate an intelligible standard to determine when mail preparation requirement changes constitute changes in rates subject to the price cap. *Id.* at 744.

In response to the Court’s remand, the Commission issued Order No. 3047, which set forth a standard to determine when mail preparation changes require compliance with the Commission’s price cap rules.² Under § 3010.23(d)(2), the Postal Service must make reasonable adjustments to its billing determinants to account for the effects of classification changes that result in the introduction, deletion, or redefinition of rate cells. The standard established by the Commission in Order No. 3047 provided that mail preparation changes could have rate effects when they resulted in the deletion or redefinition of rate cells as set forth by § 3010.23(d)(2). Order No. 3047 at 59. In conjunction with Order No. 3047, the Commission initiated a separate rulemaking proceeding in this docket to develop a procedural rule that would ensure the Postal Service properly accounted for the rate effects of mail preparation changes “in accordance with the Commission’s standard articulated in Order No. 3047.”³

While the rulemaking was pending, the Postal Service requested the Commission reconsider the standard set forth in Order No. 3047. In response, the Commission issued Order No. 3441 resolving the request for reconsideration and

² Docket No. R2013-10R, Order Resolving Issues on Remand, January 22, 2016 (Order No. 3047).

³ Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes, January 22, 2016, at 1-2 (Order No. 3048). The Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes was published in the *Federal Register* on February 1, 2016. See 81 FR 5085 (February 1, 2016).

maintaining the standard articulated in Order No. 3047.⁴ The Postal Service petitioned the Court for review of the revised standard set forth in Order Nos. 3047 and 3441.⁵

During the pendency of the appellate proceedings, the Commission issued Order No. 4393 in this docket, adopting a final procedural rule concerning mail preparation changes.⁶ The final rule institutes publication requirements for changes to mail preparation rules and requires the Postal Service to 1) affirmatively designate whether or not a change to a mail preparation requirement implicates the price cap; and 2) show by a preponderance of the evidence, if the designation is challenged, that the price cap does not apply to the change. The Postal Service also petitioned the Court for review of this final rule.⁷

Shortly after the Commission adopted the final rule in this docket, the Court issued its decision in *United States Postal Serv. v. Postal Reg. Comm'n*, 886 F.3d 1253 (D.C. Cir. 2018), vacating the Commission's standard in Order No. 3047. As a result of this decision, the Commission and the Postal Service filed a joint motion to remand the appeal of the final rule back to the Commission for further proceedings.⁸ The Commission institutes this NPR in response to the Court's order granting the motion for remand.⁹

⁴ Docket No. R2013-10R, Order Resolving Motion for Reconsideration of Commission Order No. 3047, July 20, 2016 (Order No. 3441).

⁵ Petition for Review, *United States Postal Serv. v. Postal Reg. Comm'n*, 886 F.3d 1253 (D.C. Cir. 2018).

⁶ Order Adopting Final Procedural Rule for Mail Preparation Changes, January 25, 2018, at 22-23 (Order No. 4393). The Order Adopting Final Procedural Rule for Mail Preparation Changes was published in the *Federal Register* on March 5, 2018. See 83 FR 4585 (March 5, 2018). See also Revised Notice of Proposed Rulemaking, March 27, 2017 (Order No. 3827). The Revised Notice of Proposed Rulemaking was published in the *Federal Register* on March 31, 2017. See 82 FR 16015 (March 31, 2017).

⁷ See Petition for Review, *United States Postal Serv. v. Postal Reg. Comm'n*, No. 18-1059 (D.C. Cir. February 26, 2018).

⁸ See Unopposed Motion to Remand Case, *United States Postal Serv. v. Postal Reg. Comm'n*, No. 18-1059 (D.C. Cir. May 10, 2018).

⁹ See Order, *United States Postal Serv. v. Postal Reg. Comm'n*, No. 18-1059 (D.C. Cir. May 30, 2018).

As indicated in Order No. 4393, in addition to the reporting requirement, the procedural rule set forth requirements designed to ensure compliance with the price cap based on the Commission's standard articulated in Order No. 3047. Because the substantive standard established in Order No. 3047 was vacated by the Court, the Commission proposes to rescind part of the final rule that relies upon the standard. The Commission intends to develop an appropriate standard and propose other appropriate rules implementing that standard in due course.

III. DESCRIPTION OF THE PROPOSED RULE

The proposed rule revises § 3010.23(d)(5). As described above, § 3010.23(d)(5) institutes a reporting requirement whereby the Postal Service must provide published notice of all mail preparation changes in a single source. The Postal Service began complying with the reporting requirement on March 22, 2018.¹⁰ The rule also requires the Postal Service to 1) affirmatively designate whether or not an individual mail preparation change requires compliance with § 3010.23(d)(2) in accordance with the standard set forth in Order No. 3047; and 2) demonstrate by a preponderance of the evidence, in response to a challenge, that a mail preparation change does not require compliance with § 3010.23(d)(2). Both the designation and evidentiary burden parts of the rule require a substantive standard. Because that standard was vacated and a new standard has yet to be developed, the proposed rule revises paragraph (d)(5) and removes the affirmative designation requirement and evidentiary burden. The reporting requirement will remain in the rule and exists independent of any standard as it is necessary to provide standardized, transparent reporting of mail preparation changes.¹¹

Although the Commission is instituting a new proceeding to seek comment on an appropriate standard to determine when mail preparation changes are "changes in

¹⁰ See Updated Notice Under Rule 3010.23(d)(5), March 22, 2018.

¹¹ See Order No. 4393 at 8-10 (justification for the reporting requirement).

rates” under 39 U.S.C. 3622, the absence of an immediate standard necessitates partial rescission of the rule.

IV. COMMENTS REQUESTED

Interested persons are invited to provide written comments concerning the proposed rule. As the Commission is instituting a separate proceeding for comments on a new standard, the comments should be limited to the revised procedural rule.

Comments are due no later than 30 days after the date of publication of this notice in the *Federal Register*. All comments and suggestions received will be available for review on the Commission’s website, <http://www.prc.gov>.

It is ordered:

1. Interested persons may submit comments no later than 30 days from the date of the publication of this notice in the *Federal Register*.
2. Kenneth E. Richardson will continue to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.
3. The Secretary shall arrange for publication of this Order in the *Federal Register*.

By the Commission.

Stacy L. Ruble
Secretary

List of Subjects in 39 CFR Part 3010

Administrative practice and procedure, Postal Service.

For the reasons discussed in the preamble, the Commission proposes to amend chapter III of title 39 of the Code of Federal Regulations as follows:

Part 3010—REGULATION OF RATES FOR MARKET DOMINANT PRODUCTS

1. The authority citation of part 3010 continues to read as follows:

Authority: 39 U.S.C. 503; 3662.

2. Amend § 3010.23 by revising paragraph (d)(5) to read as follows:

§ 3010.23 Calculation of percentage change in rates.

* * * * *

(d) * * *

(5) *Procedures for mail preparation changes.* The Postal Service shall provide published notice of all mail preparation changes in a single, publicly available source. The Postal Service shall file notice with the Commission of the single source it will use to provide published notice of all mail preparation changes.

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